United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

affidavit J Marling

74-1793

To be argued by
V. PAMELA DAVIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1793

RACHEL EVANS, et al.,
Plaintiffs-Appellants,

—v.—

JAMES T. LYNN, et al.,
Defendants-Appellees,

TOWN OF NEW CASTLE, NEW YORK,
Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR FEDERAL DEFENDANTS-APPELLEES

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Statement

The plaintiffs-appellants appeal from a judgment of the Hon. Milton Pollack entered in the United States District Court for the Southern District of New York on May 22, 1974, which dismissed the complaint for lack of standing on the part of the four individual plaintiffs-appellants and granted the motion of the Town of New Castle to intervene.

Appellants appealed and moved for an injunction pending appeal which was denied by order of the United States Court of Appeals for the Second Circuit dated June 18, 1974.

Issues Presented

1. Do four black residents of Westchester County of low and middle incomes allege an injury in fact by claiming that the acts of the defendants increased the racial ghettoization of Westchester County?

2. Does *Warth* v. *Seldin*, 495 F.2d 1187 (2d Cir. 1974) apply to a challenge to two Federal grants-in-aid awarded to a town with allegedly unconstitutional zoning practices so as to mandate dismissal of the complaint for lack of standing?

Statement of Facts

A. The Appellants

The four appellants are minority group members who reside in Westchester County; they do not live in the Town of New Castle (J.A.* 2a-4a).

They have low and moderate incomes (J.A. 2a-4a).

They have never tried to live in New Castle (J.A. 85a).

They have not alleged any plans to live in New Castle (J.A. 1a-16a).

The only appellant whose deposition was taken, Rachel Evans, declared at that deposition that she presently lives in decent housing and has no plans to move (J.A. 65a).

B. The Federal Defendants

The Federal defendants are the Secretaries of the Departments of the Interior ("Interior") and Housing and Urban Development ("HUD"), members of their staff and the two departments themselves.

C. The Town of New Castle

The Town of New Castle, in Westchester County, is zoned almost 90% for single family, residential housing (J.A. 95a).

It includes the King-Greeley Sanitary Sewer District ("King-Greeley") within its geographic boundaries. The

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* The Joint Appendix is designated "J.A." throughout.

King-Greeley Sewer district was created pursuant to New York Town Law, Article 12-A (McKinney 1959) (J.A. 18ca).

In 1972-73, the Town of New Castle * applied for and was awarded two Federal grants from the two defendant Departments, Interior and HUD (J.A. 93a).

D. The Grants

The HUD grant was made pursuant to the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. § 3101, *et seq.*, specifically § 3102 of that Title, Grants for Basic Water and Sewer Facilities (J.A. 18ca, 95a).

It was to provide matching funds for a sanitary sewer project in the King-Greeley district (J.A. 18ca, 95a).

The Interior grant was made pursuant to the Outdoor Recreation Programs Act, 16 U.S.C. 460(*l*) *et seq.*, specifically § 460(*l*)—8 of the Act (J.A. 18ca-19ca).

It provides a portion of the funds needed to acquire a piece of marshland known as Turner Swamp, within the Town of New Castle, and convert it into an outdoor wildlife preserve (J.A. 18ca-19ca, 95a).

E. The Approval Procedures of the Departments

Title VI, Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* and Title VIII, Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.* impose obligations upon both HUD and Interior in making these grants. Title VI, specifically Section 2000d of Title 42, United States Code, requires that no person be excluded from participation in or be denied the benefits of any program receiving federal assistance on the grounds of race, color or national origin.

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* The application for the HUD grant was actually made by the King-Greeley Sewer District (J.A. 18ca).

Title VIII, specifically Sections 3608(c) and (d)(5) of Title 42, United States Code,* require the Secretary of HUD and all executive departments and agencies respectively to administer housing and urban development programs in a manner affirmatively to further the purposes of the subchapter.

The purpose of the subchapter is stated in Section 3601 of Title 42, United States Code:

> It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.**

Both departments fulfill their Title VI obligation through an elaborate procedure of requiring advance assurances of compliance and then inspecting for compliance (J.A. 108a).

The Title VIII obligations are carried out in part by the use of a rating system for the grants which includes categories relevant to housing considerations in which the applicant can be awarded points (J.A. 222a and 230a are the respective rating sheets).

It is apparent from the face of the HUD rating sheet *** (J.A. 222a) and the accompanying regulations (J.A. 223a-

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* The legislative history of Sections 3608(c) and (d)(5) sheds no light on the interpretation of these sections in this context. *H. R. Rep. No. 473*, 90th Cong. 1st Sess. (1967); *S. Rep. No. 721*, 90th Cong. 1st Sess. (1967).

** See *Hearings on S. 1026, S. 131, etc. Before Sub-Committee on Constitutional Rights of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 36, 50 (1967) for the original wording of the policy statement which was aimed specifically at prohibiting racial discrimination in housing.

*** The original HUD rating sheet could not be found in the files of the HUD area office when the grant was reviewed (J.A. 139a-140a). The sheet was reconstructed for internal purposes by Robert Mendoza of HUD (J.A. 123a-125a). The accuracy of the reconstruction was established at Mr. Mendoza's deposition (J.A. 182a *ff.*).

229a) that specific housing considerations can earn an applicant up to 17 out of 100 points (J.A. 227a-228a). There are in addition other categories with fair housing implications such as the listings under Guiding Orderly Growth and Development (J.A. 226a-227a).

Robert Mendoza, the employee of HUD who personally visited New Castle and performed the rating in all categories except financial need, gave New Castle 2 out of 17 points under Housing Considerations (J.A. 222a, 187a, 188a, 189a). Mr. Mendoza stated in his deposition that had he known about a dispute between the Town of New Castle and the New York State Urban Development Corporation ("U.D.C."), it would have been appropriate to deduct more points (J.A. 194a-196a).

The sheet also includes a category for financial need in which New Castle was incorrectly awarded 9 points (J.A. 222a, 172a-176a). The incorrect rating was discovered and evaluated in a post-grant review (J.A. 172a-176a). Steps were then taken by HUD to investigate to see if there had been impropriety (J.A. 118a-119a) and to improve training of personnel performing financial ratings (J.A. 180a).

The implementation of Title VIII by the Bureau of Outdoor Recreation ("BOR") in its land acquisition programs consists primarily of planning and coordination with other programs in order to achieve a balance between housing and recreational facilities. There is, in addition, a heavy emphasis on creating recreation areas in urban environments. This is accomplished by giving priority to projects in urban areas (J.A. 212a ff.).

The initial responsibility for rating the Interior land acquisition grants has been given to a State Liaison Officer, (J.A. 201a), who operates pursuant to a Statewide Comprehensive Outdoor Recreation Plan or SCORP (J.A. 205a-206a). The creation and existence of this plan is a prere-

quisite for participation by a state in the departments land acquisition program. The SCORP is continually updated for changing land use practices and population trends (J.A. 207a).

The priority for urban projects is implemented through both general policy and the rating system (J.A. 230a). Mr. Arnold, the Director for BOR for the North-East testified that BOR asks the State Liaison Officers to give top priority to urban areas (J.A. 212a).

The rating system (J.A. 230a) gives the largest number of points, 5 out of 14, for "Index of Relative Intensity of Need." This is a complex formula reflecting coordination with other land use and future needs of the area, according to the SCORP (J.A. 212a).

In addition, points are given for the degree of implementation of the SCORP, local economic impact and the variety of the population to be reached (J.A. 230a).

The projects approved by the State Liaison Officer are forwarded to the BOR office in Philadelphia for final review, site inspections and the decision to fund (JA. 199a-199b a).

ARGUMENT

POINT I

A Claim of "Reinforced Racial Ghettoization" within Westchester County Does not Amount to a Claim of Injury in Fact to Residents of That County.

All parties would agree that the concept of standing to sue requires appellants to allege 1) that they are arguably within the zone of interests protected by the relevant statute *and* 2) that they have suffered or will suffer an in-

jury in fact. *Barlo wv. Collins,* 397 U.S. 159 (1970); *Association of Data Processing Service Organizations* v. *Camp,* 397 U.S. 150 (1970).

The statute, of course, is the conduit to standing. *National Welfare Rights Organization* v. *Finch,* 429 F.2d 725 (D.C. Cir. 1970). Appellants would have us believe that, where the statute is a civil rights law, a strong showing that appellants are within the zone of interest to be protected by civil rights legislation will itself amount to injury in fact.

This is not the law, *Baker* v. *Carr,* 369 U.S. 186, 204 (1969). Arguments that expanded "categories of judicially cognizable injury" might result in its becoming the law were recently rejected by the Supreme Court. *United States* v. *Richardson,* 42 U.S.L.W. 5076, 5080 (June 25, 1974); *Schlesinger* v. *Reservists Committee to Stop the War et al.,* 42 U.S.L.W. 5088, 5092 (June 25, 1974).

Writing for the Court Chief Justice Burger stated:

> While Flast [v. Cohen, 592 U.S. 83] noted that the "case or controversy" limitation on the federal judicial power found in Art. III is a "blend of constitutional requirements and policy considerations," 302 U.S. at 97, the Court, subsequently, in the context of judicial review of regulatory agency action held that whatever else the "case or controversy" requirement embodied, its essence is a requirement of "injury in fact." *Association of Data Processing Service Organizations* v. *Camp, supra,* 397 U.S. at 152. Although we there noted that the categories of judicially cognizable injury were being broadened, *id.,* 397 U.S., at 154, we have more recently stressed that the broadening of categories "is a different matter from abandoning the requirements that the party seeking review must have suffered an injury." *Sierra Club* v. *Morton, supra,* n. 9, 405 U.S., at 738. And, in defining the nature of that injury, we have only recently stated flatly: "Abstract injury is not enough." *O'Shea* v. *Littleton,* — U.S. — (1974).

Schlesinger v. *Reservists Committee to Stop the War et al., supra,* at 5091-2.

Judge Pollack correctly determined below that appellants had failed to demonstrate such an injury.

The primary statute involved here is that section of Title VIII, Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*),* the fair housing title, which requires the Secretary of HUD, and all other agencies with urban development projects, to administer these programs "in a manner affirmatively to further the policies of this subchapter", 42 U.S.C. 3608(c),(d)(5), the policies of the subchapter being fair housing. 42 U.S.C. 3601.

Turning, for the moment, to the first aspect of standing, zone of interests, it is difficult to conceive of any person who would *not* be within the zone of interests of a statute which calls for fair housing. Certainly any resident of a highly populated area would be covered, if not all United States residents. This fact, far from allowing the kind of citizen monitoring** which appellants seek, rather emphasizes the importance of the requirement that each appellant demonstrate a concrete injury to himself or herself. Only by insisting on this requirement can the courts obtain the kind of authoritative presentation which is constitutionally crucial to the unique operations of the judicial branch. *Schlesinger* v. *Reservists Committee, supra,* at 5092.

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* Appellants also relied below on Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). However, no allegations of discrimination in the operation of either project have been made, appellants entered into a stipulation stating they had no reason to believe the projects would discriminate (J.A. 84a), and Judge Pollack determined that all efforts for Title VI compliance had been fulfilled (J.A. 1082). Title VI, somewhat more specific in scope and remedy than Title VIII, would not aid appellants in any case.

** The cases cited by appellants on pp. 34-5 of their brief do not support their contention of standing as a "private attorney general." On the contrary, in each case cited the plaintiffs had a demonstrable and personal interest in the institution charged with discrimination.

What is it then that differentiates the four appellants before this Court from any other resident of Westchester County? The appellants answer is that nothing so differentiates them. Rather they vigorously argue that they are in fact *typical* of those residents, black, middle and low income. What they have in common is a lack of any connection with the area to which the funds were granted; appellants do not live in New Castle, they have not tried to live in New Castle, they will not try to live in New Castle.

Their claimed injury is that by allegedly failing to punish New Castle for alleged restrictive zoning practices,* the Federal defendants reinforced racial ghettoization in Westchester County. Such an allegation, if it had been true, would have been of concern to all Westchester residents. But it does not reveal any specific injury to appellants themselves.

In the application of the rule of injury in fact to each particular litigant, generalizations are worthless. *Association of Data Processing Service Organization* v. *Camp, supra* at 151. But in certain areas the Court has laid down some rules. *Warth* v. *Seldin,* 495 F.2d 1187 (2d Cir. 1974). Fortunately the issue of standing for Title VIII purposes has been widely litigated. An analysis of these cases demonstrates the gap between appropriate plaintiffs and the appellants here.

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* On the contrary, an inspection of the HUD rating sheet (J.A. 222a) shows that all but two points were deducted from the rating of the sewer project under the category "housing considerations" as a result of New Castle's zoning laws. If the financial points had not been improperly awarded, the grant would have been denied partly from the loss of the housing points (J.A. 177a).

A person who claims that housing has been discriminatorily denied to him may sue under the specific language of the statute. Section 810(a) of the Civil Rights Act of 1968, 42 U.S.C. 3610(a). Appellants made no such claim.

Present tenants in a building whose landlord is allegedly discriminating against others may also sue. *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972) where it was held:

> With respect to suits brought under the 1968 [Civil Rights] Act, we reach the same conclusion [of acceptable standing], insofar as *tenants of the same housing unit that is charged with discrimination are concerned* (emphasis supplied).

Appellants are not suing about their own housing units. They are not suing about any housing unit. They are suing about a sewer and a park in another town.*

Minority group members who are to be displaced from present housing by a new housing program may sue. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Powelton Civic Home Owners Association* v. *HUD*, 284 F. Supp. 809 (E.D. Pa. 1968). Appellants are in no way threatened by displacement.

Potential residents of a Federally assisted housing project may sue. *Gautreaux* v. *Chicago Housing Authority*, 265 F. Supp. 582 (N.D. Ill. 1967). There is, of course, no Federally assisted housing project involved here. Nor have appellants ever tried to live in New Castle. One appellant, Mrs. Rachel Evans, declared, at her deposition, that she lived in decent housing and intended to remain there.

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* Nor do the sewer and the park represent any loss of potential housing. The area to be served by the sewer is already heavily developed and in need of new sanitary facilities for the existing housing (J.A. 231a, 232a, 234a). The park is a marshland unsuited to housing development (J.A. 208a, 209a).

All persons who live in or do business in an urban renewal area may sue. *Shannon* v. *HUD*, 436 F.2d 809 (3rd Cir. 1970). There is no urban renewal area in this case. Appellants neither live nor do business even near the sewer and park areas.

Appellants, when asked for their claim of injury in fact, merely reiterate the fact that brings them within the scope of the statute, *i.e.* their concern with housing in Westchester County. There is no allegation of harm specifically to them if the funds are granted, no allegation of how they would be benefited by having the funds enjoined. Indeed, the fact that the relief requested—enjoining Federal funds—can in no way affect the appellants' grievance—racial ghettoization—is itself a reason for a finding of lack of standing. *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973). "Abstract injury is not enough." *Schlesinger* v. *Reservists Committee, supra,* 5091-2.

Finally, notwithstanding the possibility that hypothetical plaintiff with standing might exist, the *Richardson* and *Schlesinger* cases closed the door to the appellants' use of the argument that if no standing exists for appellants then there will be no standing for anybody.

> Closely linked to the idea that generalized citizen interest is a sufficient basis for standing was the District Court's observation that it was not irrelevant that if respondents could not obtain judicial review of petitioner's action, "then as a practical matter no one can." Our system of government leaves many crucial decisions to political processes. The assumption that if respondents have no standing to sue, no one would have standing is not a reason to find standing. See, *United States* v. *Richardson*, . . . *Schlesinger* v. *Reservists Committee, supra,* 5094.

POINT II

It is the Law of the Second Circuit That Zoning Which Prevents Low Income Housing May Not be Attacked by Persons Without Specific Plans to Live on the Land if the Zoning Were Changed.

Appellants fail in their attempt to distinguish the case at bar from the dispositive rule in this Circuit announced in *Warth* v. *Seldin, supra.* In that case it was determined that low income, minority group members did not have standing to attack the allegedly unconstitutional zoning of a nearby town, which zoning prevented low income housing. *Warth* v. *Seldin, supra,* at 1191-3.

Appellants are not complaining about either the sewer itself or the park, neither of which, as it has been pointed out, will affect the housing supply of New Castle. What appellants specifically object to is the "rewarding" of New Castle by the Federal defendants despite New Castle's "housing practices"; "housing practices" translates directly into zoning laws.

Appellants object to New Castle's failure to zone for low-income housing. They want that zoning changed; they want the government funds withheld from the town as a way of encouraging that change.

Their motivations may be strong and public spirited, but neither will suffice to provide standing. *Doremus* v. *Board of Education,* 342 U.S. 429, 435 (1952); *Sierra Club* v. *Morton,* 405 U.S. 727, 739 (1972).

The zoning of the Town of New Castle is the basis of the appellants' lawsuit and the predicate for their request for relief.*

Appellants are non-residents of New Castle, they have never tried to live in New Castle, they do not allege any intention to try to live there if the zoning is changed.

In *Warth* v. *Seldin,* low income, minority group residents of the City of Rochester objected to the exclusionary zoning of the Town of Penfield which, like New Castle, was zoned primarily for single family residences. Unlike the appellants here, the *Warth* plaintiffs alleged that they had actually sought housing in Penfield. Like appellants here they did not allege either plans or the ability to live in Penfield if the zoning were changed. As in the case at bar there was no housing facility involved in the litigation or proposed for the area.

Judge Hays wrote for the Court:

> The doctrine of standing also turns on whether the party in question has a "personal stake in the outcome of the controversy." *O'Shea* v. *Littleton,* — U.S. —, — 96 S. Ct. 669, 675 (1974); *Sierra Club* v. *Morton,* 405 U.S. 727, 732 (1972); *Baker* v. *Carr,* 369 U.S. 186, 204 (1962). Appellants lack such a personal stake. The essence of their complaint is that the zoning practices of the appellees are unfair. However true that charge may be, absent a showing that appellants themselves have suffered from these practices they lack standing to challenge them. Their

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* The dispute between New Castle and the New York State Urban Development Corporation, cited by appellants as an example of their injury, came about because UDC had the statutory ability to ignore local zoning. New York Unconsolidated Laws, section 6266(3) (McKinney, 1971).

> dispute with appellees reflects primarily a political disgruntlement. They indicate no benefit which a judgment favorable to them would produce. They allege neither capability nor intent to construct housing for themselves on any land which the court might order rezoned as an element of relief.

[*Warth* v. *Seldin*, 495 F.2d at 1192].

The lack of standing of plaintiffs to challenge zoning directly in *Warth* v. *Seldin* preclude similar plaintiffs from challenging zoning indirectly in the case at bar.

CONCLUSION

For the foregoing reasons, the dismissal of the complaint by the District Court should be affirmed.

Respectfully submitted,

August 13, 1974

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CA 74-1793

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 13th day of August 1974 she served a copy of the within

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by placing the same in a properly postpaid franked envelope addressed:

1) Richard F. Bellman, Esq., 57 Tuckohoe Rd, Yonkers, NY 10710
2) Wikler, Gottlieb, Taylor & Howard, Esqs., 40 Wall St. NY NY 10005
3) Golenbock & Barell, Esqs., 60 East 42nd St. NY NY 10017

And deponent further says she sealed the said envelopes and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline Troia

Sworn to before me this
13th day of August 19 74

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975